IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23-07-2007

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA
AND
THE HONOURABLE MRS. JUSTICE R. BANUMATHI

O.S.A.NO.246 OF 2002

1. Mrs. Josephine Jerome
   W/o. late S. Eric Jerome

2. Emanuvel Sandanaraj
   S/o. late Eric Jerome

3. Antony Julith
   D/o. late Eric Jerome

4. Moses
   S/o. late Eric Jerome

3rd and 4th Appellants declared as majors and 1st Appellant discharged from guardianship vide order dated 25.2.02 in CMP.No.20138/2001 .. Appellants

Vs.

1. S. Santiago

2. S. Thomas .. Respondents

Appeal filed under Clause 36 Rule 1 of Original Side Rules against the judgment made in T.O.S.No.27 of 1997 dated 20.12.2000 by the learned single Judge.

For Appellants : Mr.A.R. Nixon

For Respondents : Mr.R. Rajarajan for M/s.G. Rajan & Neelakantan

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J U D G M E N T

P.K. MISRA, J

This Appeal is directed against the Judgment in T.O.S.No. 27 of 1997 dated 20.12.2000. Aggrieved over the grant of probate of the Will executed by the testatrix, viz., late Mary Santiago, the Defendants have preferred this Appeal.

2. The parties are related as under:

Mary Santiago (died on 25.10.1994)
S.Santiago (P.1)

Late S.Eric Jerome (died on 29.6.95) | Josephine Nirmala Augustin | S.Thomas (P.2)

Josephine Jerome(D.1)

Emanuvel Sandanaraj (D.2) | Antony Julith (D.3) | Moses (D.4)

The case of the Plaintiffs' is that Mary Santiago left behind a Will dated 08.07.1994, where under, she had made a bequest granting life estate to her husband-First Plaintiff and absolute estate to the Second Plaintiff, who is the ultimate beneficiary. After the death of Mary Santiago, the Plaintiffs had filed O.P.No. 748/95 for issuance of probate of the Will. The Appellants/Defendants filed caveat and therefore, O.P.No. 748/95 was converted to T.O.S.No. 27/1997 alleging that disposition made under the Will was unnatural disposition. The Plaintiffs sought probate of the Will. The Defendants contested the Suit alleging that the Will is not a true, valid and genuine one and that the Plaintiffs have committed forgery and the purported Will is not a natural Will. The Defendants inter alia contended that Mary Santiago had already left behind a registered Will dated 23.3.1990 and the testatrix never intended to cancel the Will. It was further alleged that the Will is surrounded by several suspicious circumstances and therefore, the probate should not be granted.

3. On the above pleadings, the following four issues were framed:-

"1. Whether the Will executed by Mrs. Mary Santiago on 8.7.1994 is true and genuine?

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2. Whether the Will was duly executed by Mary Santiago and validly attested by witnesses?

3. Whether the Will is a rank forgery created to suit the convenience and benefit of the plaintiff ?

4. To what relief the parties are entitled?

4. The attesters to the Will were examined as P.Ws. 1 and 2 on the side of the Plaintiffs and exhibits P-1 to P-3 were marked. On the side of the Defendants, the First Defendant was examined as R.W.1 and exhibits R.1 and R-2 were marked.

5. Discussing all the issues together, on the evidence of attesters (P.Ws. 1 and 2), the learned Single Judge held that at the time of execution of the Will the testatrix was in a sound disposing state of mind. Referring to various points the learned Single Judge concluded that the alleged suspicious circumstances are dispelled by the Plaintiffs. The learned Single Judge took the view that mere presence of the propounder would not show that they have actually participated. It was also held that another son Jerome and daughter were sufficiently provided for and there is nothing unnatural in excluding them by the testatrix.

6. Assailing the findings and conclusion of the learned Single Judge, the learned counsel for the Appellants inter alia raised the following contentions.

(1) There is no specific evidence, far less proof, for due execution of the Will by the testatrix and the evidence on record merely prove the "attestation part".

(2) There are many suspicious circumstances appearing which have not been clear and, on the other hand, those suspicious circumstances have been compounded further by the fact that the Propounder has not come forward to give any explanation.

7. So far as the first contention is concerned, it is submitted by the learned counsel for the appellants that the evidence of two attesting witnesses only indicates that they have seen the testatrix putting her signature on a document which was already prepared, but there is no whisper anywhere that the Will had been prepared on the basis of the instructions of the testatrix or the testatrix had put her signature after going through the contents or that the contents had been read over and explained to the testatrix and, therefore, it cannot be said that due execution of the Will has been proved.

8. Learned counsel appearing for the respondents has submitted that the mode of proof of Will is not different from any other document save and except the requirement under Section 68 of

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the Evidence Act regarding proof of attestation by examining one of the attesting witnesses, if alive. It is submitted by him that rigor of Section 68 has been complied with in this case and the signature of the testatrix having been proved through the attesting witnesses and the attestation having been proved, nothing further was required to be proved and it is for the caveators raising objection to specifically plead and prove the reasons for which the Will should be discarded.

9. In A.I.R. 1959 SC 443 (H. VENKATACHALA IYENGAR v. B.N. THIMMAJAMMA AND OTHERS), it was observed:

> "19. However, there is one important feature which distinguishes will from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a Court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the Court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, Courts would be justified in making a finding in favour of the propounder. In other words the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated." (Emphasis added)

10. In (1974) 2 SCC 600 (SURENDRA PAL & OTHERS v. DR (Mrs.) SARASWATI ARORA & ANOTHER), it was observed :-

> "7. The propounder has to show that the will was signed by the testator; that he was at the relevant time in a sound disposing state of mind, that he understood the nature and effect of the dispositions, that he put his signature to the testament of his own free will and that he has signed it in the presence of the two witnesses who attested it in his presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder is discharged. But there may be cases in which the execution of the will itself is

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surrounded by suspicious circumstances, such as, where the signature is doubtful, the testator is of feeble mind or is overawed by powerful minds interested in getting his property, or where in the light of the relevant circumstances the dispositions appear to be unnatural, improbable and unfair, or where there are other reasons for doubting that the dispositions of the will are not the result of the testator's free will and mind. In all such cases where there may be legitimate suspicious circumstances those must be reviewed and satisfactorily explained before the will is accepted. Again in cases where the propounder has himself taken a prominent part in the execution of the will which confers on him substantial benefit that is itself one of the suspicious circumstances which he must remove by clear and satisfactory evidence. After all, ultimately it is the conscience of the Court that has to be satisfied, as such the nature and quality of proof must be commensurate with the need to satisfy that conscience and remove any suspicion which is reasonable man may, in the relevant circumstances of the case, entertain." (Emphasis added)

11. In (2005) 1 SCC 40 (DAULAT RAM & OTHERS v. SODHA & OTHERS), it was observed :-

"10. Will being a document has to be proved by primary evidence except where the Court permits a document to be proved by leading secondary evidence. Since it is required to be attested, as provided in Section 68 of the Indian Evidence Act, 1872, it cannot be used as evidence until one of the attesting witnesses at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence. In addition, it has to satisfy the requirements of Section 63 of the Indian Succession Act, 1925. In order to assess as to whether the Will has been validly executed and is a genuine document, the propounder has to show that the Will was signed by the testator and that he had put his signatures to the testament of his own free will; that he was at the relevant time in a sound disposing state of mind and understood the nature and effect of the dispositions and that the testator had signed it in the presence of two witnesses who attested it in his presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder is discharged. But where there are suspicious circumstances, the onus is on the propounder to remove the suspicion by leading appropriate evidence. The burden to prove that the Will was forged or that it was obtained under undue

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influence or coercion or by playing a fraud is on the person who alleges it to be so."

12. Similar view was also expressed in (2005) 8 SCC 67 (PENTAKOTA SATYANARAYANA & OTHERS v. PENTAKOTA SEETHARATNAM & OTHERS) and (2005) 8 SCC 784 (SRIDEVI & OTHERS v. JAYARAJA SHETTY & OTHERS). All these decisions were followed in 2007-2-L.W. 870 (B. VENKATAMUNI v. C.J. AYODHYA RAM SINGH AND OTHERS).

13. Similarly in 2007(2) CTC 172 (NIRANJAN UMESCHANDRA JOSHI v. MRIDULA JYOTI RAO AND OTHERS), it was observed by the Supreme Court as follows :-

"32. The burden of proof that the Will has been validly executed and is a genuine document is on the propounder. The propounder is also required to prove that the testator has signed the Will and that he had put his signature out of his own free will having a sound disposition of mind and understood the nature and effect thereof. If sufficient evidence in this behalf is brought on record, the onus of the propounder may be held to have been discharged. But, the onus would be on the applicant to remove the suspicion by leading sufficient and cogent evidence if there exists any. In the case of proof of Will, a signature of a testator alone would not prove the execution thereof, if his mind may appear to be very feeble and debilitated. However, if a defence of fraud, coercion or undue influence is raised, the burden would be on the caveator. (See Madhukar D. Shende v. Tarabai Shedage, 2002 (1) CTC 244 : 2002(2)SCC 95 and Sridevi & Others v. Jayaraja Shetty & Others, 2005(1) CTC 443 : 2005 (8) SCC 784). Subject to the above, proof of a Will does not ordinarily differ from that of proving any other document." (Emphasis added)

14. Apart from these decisions, reference can also be made to the decision of the Supreme Court in JT 1998 (3) S.C. 37 = (1998) 4 SCC 384 (GURDIAL KAUR 7 OTHERS v. KARTAR KAUR & OTHERS), wherein it was observed :-

"4. The law is well settled that the conscience of the court must be satisfied that the Will in question was not only executed and attested in the manner required under the Indian Succession Act, 1925 but it should also be found that the said Will was the product of the free volition of the executant who had voluntarily executed the same after knowing and understanding the contents of the Will. Therefore, whenever there is any suspicious circumstance, the obligation is cast on the propounder of the Will to dispel the suspicious circumstance. As in the facts and circumstances of the case, the court of appeal

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below did not accept the valid execution of the Will by indicating reasons and coming to a specific finding that suspicion had not been dispelled to the satisfaction of the Court and such finding of the court of appeal below has also been upheld by the High Court by the impugned judgment, we do not find any reason to interfere with such decision. This appeal, therefore, fails and is dismissed without any order as to costs."

(Emphasis added)

15. A perusal of the aforesaid decisions makes it clear that something more is required to be proved than mere proof of signature of the testatrix. It is required to be proved that the hand was with the mind and that the testatrix put her signature intending to bequeath the property in the manner indicated.

16. In 2006(2) CTC 756 (JOSEPH ANTONY LAZARUS (DEAD) BY L.Rs. v. A.J. FRANCIS), the Supreme Court dealt with an appeal against a decision of the Madras High Court in the matter relating to grant of probate. In the said case, the learned single Judge had held that the plaintiff had been able to prove proper execution and attestation of the Will and was entitled to grant of probate. The Division Bench had noted that the Advocate,who had drafted the Will and the Sub-Registrar before whom the Will was registered were not examined and it was concluded that "there was no proof that the document had ever been read over and explained to the testatrix before the same was registered".

While dismissing the appeal and confirming the decision of the Division Bench, the Supreme Court observed inter alia:-

"13. The last and perhaps the significant aspect of this matter is the failure of the appellant to examine the learned advocate who is said to have drafted the Will on the instructions of the testatrix and the non-examination of the Sub-Registrar before whom the Will is said to have been presented for registration. Both the said witnesses could have conclusively proved the facts relating to the preparation, execution and registration of the Will. In the absence of any evidence, we are unable to ascertain as to whether the Will was ever read over and explained to the testatrix before she is said to have executed and presented the same for registration. The cumulative effect of all the circumstances taken together gives rise to a genuine doubt regarding the genuineness of the Will and as to whether the same had, in fact, been executed by the testatrix and, if so, of her own free volition."

(Emphasis added)

17. Learned counsel for the respondents has submitted that since the testatrix admittedly knew English, being a teacher, it must be assumed, particularly keeping in view the provisions

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contained in Section 114 of the Evidence Act, that before putting the signature the testatrix must have read the document.

18. It is of course true that ordinarily when a document is written in a language known to the Executant and the signature of the Executant is either admitted or proved, it is for the Executant of the document, if alive, to explain under what circumstances the signature is appearing on the document. However, since the Will takes effect after the death of the Executant, obviously the Executant would not be in a position to accept or deny the signature. Therefore, the initial burden is always on the Propounder to prove that the testatrix has duly executed the testament which would obviously include attestation, as under Section 63 of the Indian Succession Act, attestation is considered to be a part of the execution. Attestation is required to be proved in accordance with Section 68 of the Evidence Act. Mere proof of attestation does not prove "due execution" in each and every case. It is well known that an attesting witness need not know the contents of the document and he merely attests the signature of the Executant. If any Will is prepared in the presence of attesting witnesses as per the instructions of the testatrix, obviously the attesting witnesses should be in a position to prove the execution of the Will. However, in the present case, the attesting witnesses have stated that by the time they came, the document was already prepared and the testatrix merely signed the document in their presence. It was therefore necessary for the Propounder of the Will to prove that the Will had been executed by the testatrix after understanding the contents thereof. This could have been done by proving that the document had been prepared as per the instructions of the testatrix or that the testatrix herself gone through the document or that it had been read over and explained to her or even by other surrounding and circumstantial evidence like the testatrix acknowledging that the Will had been prepared according to her instructions or even by the fact that execution of the Will had been admitted before the statutory authority such as the Sub-Registrar.

19. In the present case, the Will has been notarised before a Notary Public. It is of course true that the Will contains a certificate by the Notary that such Will was signed and acknowledged by the testatrix as her last Will and testament in the presence of two witnesses. However, such Notary has not been examined and no explanation is forthcoming for non-examination of such Notary. It is of course true that the Caveators had taken a plea that signature on the Will was forged, but subsequently they have given up such a contention at least in the present appeal. However, as already indicated, merely because the signatures of the testatrix appear on the Will, it cannot be assumed for a moment that the testatrix had duly signed the Will after knowing the contents thereof.

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20. Apart from the above, there are certain other suspicious circumstances. It is no doubt true that a Will is not required to be registered. However, the previous Will had been registered, which is apparent even from the recitals made in paragraph 2 of the Will. No explanation is forthcoming as to why the subsequent Will was also not registered, even though as per the evidence it is apparent that the Sub-Registrar's Office was hardly five buildings away. As per the previous Will, a life estate had been given to the husband and both the sons were to inherit the house in question. As per the present Will, after the life estate of the husband, entire property is to be inherited by the second son to the total exclusion of the first son. It is of course true that in the first Will as well as in the second Will, daughters had been excluded as they were married and they were well off. There is, however, no evidence as to why the elder son, who was an equal beneficiary with the second son as per the earlier registered Will, has been altogether excluded. It is of course true that in para 7 of the Will it is stated that the eldest son has been adequately and well provided for by the husband S. Santiago of the testatrix, but there is no evidence on this aspect. Both the beneficiaries, the husband and second son of the testatrix, have conveniently remained away from the witness box for no apparent reason.

21. Learned counsel for the respondents has submitted that as per the statement of the contesting defendant himself, a loan had been arranged for the construction of the eldest son and that is the reason for the exclusion. The evidence on record does not clearly indicate the loan which had been purportedly arranged by the father was meant to be a loan either for the father or for the son and who has to discharge the loan. At any rate, for explaining this aspect, the husband, who is one of the beneficiaries, should have been examined. It is also apparent from the evidence of the attesting witnesses that they were quite close to the husband and the husband was present at the time of execution of the Will and, therefore, it can be said that the Propounder has taken a prominent role in preparation and execution of the Will and yet the husband has chosen to keep himself away from the witness box. Coupled with these unexplained circumstances and drawal of adverse inference, the lack of specific evidence relating to due execution of the Will prompt us to reverse the findings of the trial court. Accordingly, the judgment of the trial court is liable to be set aside.

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22. For the aforesaid reasons, this Original Side Appeal is allowed and the judgment of the trial court is set aside. No costs.

dpk

Sd/
Asst.Registrar

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Sub Asst.Registrar

To

1. The Sub-Asst. Registrar, Original Side, High Court,Madras

2. The Record-Keeper, V.R. Section, High Court, Madras

+ 1 cc to Mr. A. R. Nixon, Advocate, SR No.45380

+ 1 cc to Mr. G. Rajan, Advocate, SR No.45222

SSV(CO)
SR/17.8.2007

JUDGMENT IN OSA.246/2002

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